IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. MICHAEL LYNN TAYLOR, Petitioner.	)	2 CA-CR 2007-0199-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200101483

Honorable Stephen F. McCarville, Judge

REVIEW GRANTED; RELIEF DENIED

Harriette P. Levitt — Tucson
Attorney for Petitioner

E C K E R S T R O M, Presiding Judge.

¶1 Petitioner Michael Lynn Taylor was convicted after a jury trial of possession of methamphetamine, a dangerous drug, and possession of drug paraphernalia. This court affirmed the convictions and the sentences of seven and three years' imprisonment. *State v. Taylor*, No. 2 CA-CR 2004-0370 (memorandum decision filed Oct. 6, 2005). Taylor sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., claiming his trial

counsel had been ineffective. The trial court denied relief after an evidentiary hearing. In his petition for review, Taylor challenges the trial court's ruling. We will not disturb the ruling unless the trial court abused its discretion in denying relief. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990).

¶2 In his Rule 32 petition, Taylor contended trial counsel had been ineffective because he had not filed a motion to suppress evidence seized after Coolidge Police Officer Brian Miller stopped his car. Taylor maintained he had alerted trial counsel to the fact that Taylor believed the search of his car had been unlawful. And, Taylor asserted, he had reminded trial counsel of his position during trial, but counsel had stated it was too late to raise the issue at that juncture. Additionally, Taylor contended he had told trial counsel that he had made a taped statement to Miller, during which Miller had commented that he knew the drugs did not belong to Taylor but belonged to Charlie Yandell, who had been arrested earlier that evening. Taylor asserted in his Rule 32 petition that counsel had told him the signed statement Taylor purportedly had given and the tape recording of the verbal statement had been lost, yet trial counsel did not request an instruction pursuant to *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964).

¶3 As the trial court correctly noted in its minute entry denying post-conviction relief, a defendant is not entitled to relief from a conviction unless he is able to establish that counsel's performance was both deficient, based on prevailing professional norms, and prejudicial, that is, the outcome of the case would have been different but for the deficient

performance. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). The defendant is not entitled to relief if he cannot prove both prongs of the test for ineffective assistance of counsel. *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985).

¶4 Denying relief after an evidentiary hearing at which Taylor's trial and appellate counsel both testified, the trial court first noted that Taylor conceded the stop of his car on the ground that he had faulty equipment was lawful. Nor did Taylor dispute that his arrest for driving on a suspended license had been lawful. The court stated, "The defendant's argument that the search was illegal is predicated on the search being incident to an arrest, or, the court finding that the inventory search was a pretext to conduct a warrantless search unsupported by probable cause. *State v. Dean*, 206 Ariz. 158, 76 P.[3]d 429 (2003)." The court concluded that, on the record before it, it did not appear the inventory search had been a pretext. The court stated in that regard: "The record is unclear whether the vehicle would have been disruptive to the business by blocking access or the flow of traffic in the morning hours if permitted to remain. Accordingly, this court can not find that the decision to tow the vehicle was in bad faith or used as a pretext for the inventory search." The court concluded that Taylor was not entitled to post-conviction relief on this ground.

¶5 On review, Taylor reiterates his contention that the inventory search had been pretextual. He also maintains, as he did below, that, in any event, the search exceeded the scope of an arguably lawful search when it was extended beyond the passenger compartment

to the trunk of the car. Taylor adds that, because counsel did not interview Miller until the eleventh hour and did so "in a perfunctory manner," trial counsel did not learn about the nature of the search until it was already too late to file a motion to suppress. Finally, Taylor maintains the car was parked on private property and there was nothing in the record establishing it had to be removed; therefore, there was insufficient evidence that an inventory search truly had been necessary. And, Taylor asserts, in any event the court's characterization of the search as an inventory search was erroneous.

¶6 Even assuming, without deciding, that counsel had performed deficiently by not filing a motion to suppress and by interviewing Miller at such a late date, we cannot say the trial court abused its discretion by denying relief on this claim. The record before the court contained evidence establishing the car had been parked on private property; that police policy required that it be removed; and that despite the fact Miller admitted he was looking for contraband, he made that statement in connection with his explanation of how he conducted an inventory and described the kinds of things he looked for in impounding a vehicle, among which was contraband.

¶7 Notwithstanding Miller's concession at trial that he was looking for contraband, the court did not err by characterizing the search as an inventory search based on the record before it. And as our supreme court recently reiterated in *State v. Gant*, 216 Ariz. 1, ¶ 24, 162 P.3d 640, 646 (2007), an inventory search is an alternative justification for a warrantless search of a car incident to an arrest when officers intend to tow the car.

See also South Dakota v. Opperman, 428 U.S. 364, 372, 96 S. Ct. 3092, 3098-99 (1976); *Dean*, 206 Ariz. 158, ¶ 10, 76 P.3d at 432. In *Dean*, the court rejected the state's contention that the warrantless search of the Jeep the defendant had been driving was a lawful inventory search, rather than "'a pretext concealing an investigatory police motive.'" *Dean*, 206 Ariz. 158, ¶ 10, 76 P.3d at 432, *quoting Opperman*, 428 U.S. at 376, 96 S. Ct. at 3100. In light of the officer's testimony at the suppression hearing that he had searched the Jeep and "his purpose was 'to search for evidence,'" the court in *Dean* found the trial court had not erred "in concluding that the search was not an administrative inventory." *Id*.

¶8 Here, based on Miller's trial testimony, the record supports the trial court's conclusion that this was truly an inventory search in preparation for the towing of the car. Miller testified at the voluntariness hearing, held on the first day of trial, that he called for a tow after he arrested Taylor. He also stated he had placed Taylor in the back of his patrol car and immediately began to search the car, adding he finished the "inventory search . . . because [he] already kn[e]w it ha[d] to be towed so we ha[d] to do an inventory." At trial, Miller provided similar testimony. He stated, implying he had followed regular police procedure in this case, that the car had to be secured, and "[w]e first call for a tow and then we do an inventory search of the car at which time, every area, every compartment of that car is checked." He explained that the reason for an inventory search is to protect the person "from losing any of his valuables inside the car and it protects me in making sure that I didn't take any of his valuables and things like that." When placed in context, Miller did not

actually say he was looking for contraband only, as Taylor suggests, but he explained it was among the things he was looking for; he stated, "You know, you need to check for different things and make sure there's no contraband." Thus, the record supports the trial court's finding that the inventory search[1] was not pretextual.

¶9 This case, then, is distinguishable from *Dean*. *See* 206 Ariz. 158, ¶ 10, 76 P.3d at 432. And, it is similarly distinguishable from *Gant*; there, officers testified they had not intended to impound the car "until after they searched the passenger compartment and found the contraband." 216 Ariz. 1, ¶ 24, 162 P.3d at 646. The record supports the trial court's conclusions that the evidence would not have been suppressed had trial counsel filed a motion to suppress and that Taylor was not entitled to relief based on this claim of ineffective assistance of counsel.

¶10 Taylor's contention that, as a search incident to arrest, Miller was limited to searching the passenger compartment of the car, necessarily fails. This was an inventory search, not just a search of a vehicle incident to Taylor's arrest. Thus, Taylor's reliance on *Arkansas v. Sanders*, 442 U.S. 753, 755, 99 S. Ct. 2586, 2588 (1979), *overruled by United States v. Ross*, 456 U.S. 798, 102 S. Ct. 2157 (1982), is misplaced; *Sanders* did not involve an inventory search, but the search of the suitcase that was in the trunk of a taxi cab.

[1]We note that in our recitation of the facts in the memorandum decision on appeal, we referred to the search of the car as "an on-site inventory search."

¶11 Nor has Taylor persuaded us the trial court abused its discretion in denying relief on his claim that trial counsel had been ineffective for failing to request a *Willits* instruction because of the purportedly lost statement Taylor had given to Miller. The trial court concluded the record did not support the instruction, pointing out those portions of the record supporting its conclusion. Based on the record, we conclude the trial court resolved this issue correctly, and we therefore adopt the court's ruling. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

¶12 Although we grant Taylor's petition for review, we deny relief.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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PHILIP G. ESPINOSA, Judge

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GARYE L. VÁSQUEZ, Judge